1984

The State of Utah v. Cary L. Lenzing : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19091
CARY L. LENZING,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT AND CONVICTION OF ATTEMPTED CRIMINAL HOMICIDE, A SECOND DEGREE FELONY; AND AGGRAVATED ROBBERY, A FIRST DEGREE FELONY; IN THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE HOMER F. WILKINSON, JUDGE, PRESIDING.

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with attempted criminal homicide, a second degree felony, in violation of Utah Code Ann. § 76-5-201 (1978), aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302(1978), carrying a concealed dangerous weapon, a Class "B" misdemeanor, in violation of Utah Code Ann. § 76-10-504 (1978), as amended.

DISPOSITION IN THE LOWER COURT

After a jury trial on February 28, March 1 and 2, 1983, appellant was convicted on all charges in the Third Judicial District Court of Utah before the Honorable Homer F. Wilkinson. The trial judge sentenced appellant to the indeterminate term of not less than 1 nor more than 5 years at the Utah State Prison for the crime of attempted criminal homicide; the indeterminate term of not less than 5 years to life at the Utah State Prison for the crime of aggravated

robbery; and the indeterminate term of from 0 to 6 months at the Utah State Prison for the crime of carrying a concealed dangerous weapon, those sentences to run concurrently.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence below.

STATEMENT OF FACTS

On November 9, 1982 at approximately 4:00 p.m., Jack P. Hillard, a transient and sometime sheepherder (T. 8, 9, 10, 41), returned from selling plasma to his campsite near Roper Yards at 3000 South 500 West in South Salt Lake City, Utah (T. 5, 44). Shortly thereafter, appellant and another individual arrived at Mr. Hillard's campsite (T. 7, 8). Mr. Hillard and appellant conversed for a few minutes and the third person slept (T. 11). Appellant asked Mr. Hillard where his partner, Bill Southworth, was. Mr. Hillard replied that Mr. Southworth had not yet returned from selling plasma (T. 12).

A few minutes later, Mr. Hillard felt something in his back and turned to find appellant stabbing him (T. 13). Mr. Hillard reached for his back and connected with appellant's butcher knife and hand. Mr. Hillard tried to pull the knife out of his back (T. 14). Appellant next stabbed Mr.

Hillard in the right chest area. When Mr. Hillard asked appellant if he was trying to kill him, appellant made no reply (T. 16, 17, 29).

Mr. Hillard was stabbed a third time by appellant on the left side of his stomach (T. 17). After Mr. Hillard fell to the ground, appellant went through his pockets and struggled to get Mr. Hillard's watch off his wrist, saying that he had to get it off (T. 21, 22). The watch has not been recovered. Appellant stabbed Mr. Hillard a fourth time, though he has no recollection of that fourth stab (T. 30, 125).

As a result of this unprovoked attack, Mr. Hillard suffered a collapsed lung and lost 11 pints of blood, his left kidney, his spleen, and part of his pancreas and small intestine (T. 138, 143, 144). One wound came within fractions of an inch of piercing Mr. Hillard's heart (T. 139).

At about 5:30 p.m., Bill Southworth, Mr. Hillard's partner, returned to their campsite. He found Mr. Hillard on the ground, bleeding. Mr. Southworth called the police, who arrived along with paramedics shortly thereafter. Officer Leo Lindsay of the South Salt Lake Police Department assisted the paramedics and then questioned Mr. Southworth (T. 101, 102). Mr. Southworth reported that Mr. Hillard's green backpack appeared to be missing from the campsite (T. 91, 105).

Officer Lindsay walked along the railroad tracks to another hobo campsite at 3350 South (T. 105). He found appellant and two other men, one of whom had passed out (T. 106). Officer Lindsay observed a green backpack behind appellant and asked him if it was his. Appellant said it was (T. 108).

Officer Lindsay noticed blood on appellant's left side and coat. Appellant slowly moved the pack out of the officer's view with his left hand and moved his right hand under his jacket. Upon seeing this, Officer Lindsay brushed open appellant's coat and found a knife in a sheath, stuck in appellant's belt (T. 108, 109). Officer Lindsay arrested and handcuffed appellant and walked with him several blocks through a field to the officer's patrol car (T. 110, 117). No sobriety tests were given to appellant (T. 117, 180).

ARGUMENT

POINT I

THE TRIAL COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE APPELLANT MAKES NO REFERENCE TO THE RECORD SUPPORTING HIS STATEMENT OF FACTS.

In State v. Tucker, Utah, 657 P.2d 755 (1982), this Court affirmed the trial court's judgment in part due to the appellant's failure to make any reference to the record in his

statement of the facts:

> A separate and independent basis for the affirmance of the trial court is that the defendant failed to refer to any portion of the record that factually supports his contentions on appeal. This Court will assume the correctness of the judgment below if counsel on appeal does not comply with the requirements of Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, as to making a concise statement of facts and citation of the pages in the record where they are supported.

Id. at 756-757, citing Lepasiotes v. Dinsdale, 121 Utah 359, 242 P.2d 297 (1957). See also State v. Vigil, Utah, 661 P.2d 947, 948 (1983); State v. Steggell, Utah, 660 P.2d 252, 253 (1983).

Appellant fails to refer to the record to support any of his factual statements. Thus, he has violated Rule 75 (p)(2)(2)(d), Utah Rules of Civil Procedure, and the trial court's judgment should be affirmed on that basis alone.

POINT II

THE STATE'S EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT APPELLANT COMMITTED THE OFFENSE WITH THE REQUISITE INTENT.

Appellant contends that his intoxicated condition prevented him from forming the requisite intent necessary for the commission of attempted criminal homicide. Utah Code Ann. § 76-2-306 (1978) provides in pertinent part:

> Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of an offense . . . .

Appellant was convicted of attempted criminal homicide in violation of Utah Code Ann. § 76-5-201 (1978). Although criminal homicide covers various mental states, the requisite mental state for the attempted criminal homicide charged in this case was that appellant intentionally or knowingly attempted to cause the death of another.

A person acts intentionally when it is his conscious objective or desire to engage in the conduct or to cause the result; a person acts knowingly when he is aware that his conduct is reasonably certain to cause the result. See Utah Code Ann. § 76-2-103 (1) and (2) (1978). In State v. Murphy, Utah, 674 P.2d 1220, 1223 (1983), this Court stated with reference to proof of intent:

> [I]ntent need not be proved by direct evidence. It may be inferred from the actions of the defendant or from surrounding circumstances.

The instant case is similar to the case of State v. Bush, Utah, 646 P.2d 748 (1982). In Bush, the defendant, while under the influence of alcohol, kidnapped several people, stole two cars, shot at one of the passengers in the

he was driving, and engaged in a high speed chase with police before crashing and being apprehended. Two of those kidnapped testified that during the ordeal the defendant spoke coherently and followed directions without difficulty, despite referring to himself as a drunk-crazed murderer. The judge in Bush returned a verdict of guilty of aggravated kidnapping, attempted homicide and aggravated robbery.

This Court noted that while the defendant may have been intoxicated the evidence of his ability to communicate and make decisions was sufficient for the trial court to conclude that he was capable of forming the requisite intent for the crimes with which he was charged. Therefore, the verdict of the factfinder was affirmed. See also State v. Sisneros, Utah, 631 P.2d 856 (1981).

On the facts presented in the present case, the jury, as trier of fact, could reasonably conclude appellant's intoxication did not negate his intent. Although appellant had been drinking, he was coherent and could understand and follow instructions.

At trial, Mr. Hillard said that appellant had been drinking, but was not intoxicated (T. 42). Officer Lindsay who had been trained to spot intoxication, said appellant had been drinking, but was not intoxicated, did not have bloodshot eyes, and was able to walk through a field and across railroad tracks unassisted (T. 113, 116, 117, 129, 130, 200).

Officer Melvin Long testified that appellant had been drinking, but was not drunk (T. 201). Finally, Sergeant James Foster was of the opinion that appellant appeared to be intoxicated, but admitted having had very litte verbal contact with him.

While there appears to be some discrepancy in the testimonies of Officers Lindsay and Long and Sergeant Foster as to whether or not appellant was intoxicated, this was a question for the jury to resolve. See State v. McCullar, Utah, 674 P.2d 117, 118 (1983), where the Court said that "judging the credibility of the witnesses and weight of the evidence is exclusively the prerogative of the jury."

The accounts of appellant's degree of intoxication are similar to those given in State v. Wood, Utah, 648 P.2d 71 (1982), where this Court held that the defendant was not entitled to an instruction on intoxication. Although there was evidence that the defendant had been drinking, there was no evidence that he was so intoxicated at the time of the crime that he was unable to form the intent necessary to prove robbery.

This Court said in Wood, 648 P.2d at 90, that in order for the defendant successfully to use the defense of intoxication, it would have been necessary to show that his mind had been affected to such an extent that he did not have the capacity to form the requisite intent. Appellant has not shown that there was such a significant impact on his capacity

to reason, in the instant case. There is evidence that appellant had been drinking, but no evidence that it affected his ability to form the necessary intent.

The voluntary intoxication of appellant was not so pervasive as to negate the required intent for attempted criminal homicide.

POINT III

THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE VERDICT OF GUILTY OF AGGRAVATED ROBBERY.

Appellant was convicted of aggravated robbery in violation of Utah Code Ann. § 76-6-302 (1978). That statute reads in pertinent part:

> (1) A person commits aggravated robbery if in the course of committing robbery, he:
>
> (a) Uses a firearm or facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon; or
>
> (b) Causes serious bodily injury upon another.
>
> . . .
>
> (3) For the purposes of this part, an act shall be deemed to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

The State proved the elements of aggravated robbery at trial. Appellant stabbed Mr. Hillard with a knife which caused the victim serious bodily injury (T. 15, 136-146). Immediately after stabbing Mr. Hillard, appellant went through the

victim's pockets and took his watch (T. 20, 21). Money that was found in possession of appellant had blood on it and was similar in denomination to that which Mr. Hillard had in his pockets prior to the stabbing incident (T. 62, 173, 179, 231, 232).

The last time Mr. Hillard had seen his green pack was prior to the stabbing, when it was in his camp (T. 34). When Mr. Southworth arrived at the campsite, the backpack was missing (T. 91). The next time the pack was seen it was in the possession of appellant, who claimed it was his and tried to hide it from Officer Lindsay (T. 108, 109).

In State v. McCullar, 674 P.2d at 118, this Court said that it would not overturn the jury's verdict "unless the admissible evidence produced at trial is so lacking and unsubstantial that reasonable minds must necessarily entertain a reasonable doubt of defendant's guilt." There is no question that Mr. Hillard was stabbed and seriously wounded with a knife by appellant. Mr. Hillard's pack was seen in his camp just prior to appellant's attack. It was found shortly thereafter in appellant's possession. Based on this evidence, it was not unreasonable for the jury to believe that the pack was taken by appellant after he stabbed Mr. Hillard.

Appellant might contend that such reasoning convicts him on circumstantial evidence. However, as noted in State v. Clayton, Utah, 646 P.2d 723, 725 (1982), "circumstantial evidence alone may be competent to establish the guilt of the

accused." Thus, there was sufficient evidence to sustain appellant's conviction of aggravated robbery.

CONCLUSION

There was sufficient evidence presented by the State to sustain the conviction of attempted criminal homicide. Appellant, though somewhat intoxicated, was capable of forming the requisite intent for this crime. The State's evidence was sufficient to sustain a verdict of guilty of aggravated robbery.

RESPECTFULLY submitted this 9th day of July, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid, to Brooke C. Wells, Attorney for Appellant, 333 South 2nd East, Salt Lake City, Utah 84111, this 9th day of July, 1984.

Kathleen D. Kellersberger